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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DISTRICT OF COLUMBIA BOARD OF PAROLE, ET AL.,
Petitioners,

v.

ROOSEVELT BRANDON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. The Court of Appeals held that an inmate, convicted of armed rape while on parole from a prior murder conviction, stated a "viable" equal protection claim by alleging that, in considering him for parole, his parole board did not release him within the average time it released other parole violators and acted in bad faith. It ruled that this claim was sufficient to require the parole board to state sensible and good faith reasons for failing to grant reparole earlier.

The principal question presented for review is whether *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, can be circumvented merely by pleading an equal protection claim on essentially the same facts that *Dumschat* held do not state a due process claim.

2. Whether the decision of the Court of Appeals is inconsistent with *Connecticut Board of Pardons v. Dumschat*, *supra* and *Jago v. Van Curen*, 454 U.S. 14, because it holds that liberty interests may arise from administrative practice, and with *Hewitt v. Helms*, 459 U.S. 460, because it holds that liberty interests may arise from informal internal directives, considering that any such practices or directives may by definition be changed at will and at any time by the Board of Parole.

PARTIES

The petitioners are the District of Columbia Board of Parole and its members, who are Joan A. Burt, Carl D. Coleman, H. Albion Ferrell, Bernice Just, and Warren H. Moore, all of the District of Columbia.

The respondent is Roosevelt Brandon, Lorton, Virginia.

INDEX

SUBJECT INDEX

	Page
Questions Presented	i
Parties	ii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Reason for Granting Writ	8
Conclusion	15
Appendix A	1a
Appendix B	13a
Appendix C	14a
Appendix D	16a
Appendix E	17a
Appendix F	22a
Appendix G	23a

CASES CITED

Connecticut Board of Pardons v. *Dumschat*, 452 U.S. 458	i, 8, 9, 10, 11, 12, 14
Greenholtz v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1	9 10, 13
Hewitt v. *Helms*, 459 U.S. 460	i, 13, 14
Jago v. *Van Curen*, 454 U.S. 14	i, 10, 13, 14
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422	8
Lucas v. *Hodges*, 730 F.2d 1493	9, 12
Meachum v. *Fano*, 427 U.S. 215	13
Montanye v. *Haymes*, 427 U.S. 236	13
Olim v. *Wakinekona*, 461 U.S. 238, 103 S. Ct. 1741	10, 13, 14

UNITED STATES CODE CITED

Title 28, Section 1254(1)	2
Title 28, Section 1915(d)	4
Title 42, Section 1983	4

INDEX (Continued)

	Page
DISTRICT OF COLUMBIA CODE CITED	
Section 24-204(a)	2, 13
OTHER AUTHORITIES CITED	
9 D.C. Rules and Regulations § 105 (1972)	2, 13
9 D.C. Rules and Regulations § 104.1	3, 13

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v.

ROOSEVELT BRANDON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The District of Columbia Board of Parole and its individual members, through the Corporation Counsel, petition the Court for a writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The May 8, 1984, opinion of the United States Court of Appeals for the District of Columbia Circuit (App A, 1a-12a) is reported at 734 F.2d 56. On July 6, 1984, the panel amended two sentences in its opinion (App. C, 14a-15a).

The panel denied rehearing on July 11, 1984 (App. D, 16a). The court of appeals denied rehearing *en banc* on July 11, 1984, with Judge Ginsburg issuing a statement for herself and Judges Wright, Bork and Scalia and with Judge Starr issuing a dissenting opinion for himself and Judge Wilkey (App. E, 17a-21a). The orders amending the opinion and denying rehearing and rehearing *en banc* are not yet reported.

The order of the District Court is not reported (App. G, 23a).

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1984 (App. B, 13a). On June 6, 1984, petitioners filed a petition for rehearing and suggestion for rehearing *en banc*. On July 11, 1984, the court of appeals denied rehearing and the suggestion for rehearing *en banc*. (16a, 17a). On October 4, 1984, the Chief Justice signed an order extending the time for filing a petition for writ of certiorari to and including October 29, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

D.C. Code § 24-204(a) provides.

> (a) Whenever it shall appear to the Board of Parole that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his release is not incompatible with the welfare of society, and that he has served the minimum sentence imposed or the prescribed portion of his sentence, as the case may be, the Board may authorize his release on parole upon such terms and conditions as the Board shall from time to time prescribe. While on parole, a prisoner shall remain in the legal custody and under the control of the Attorney General of the United States or his authorized representative until the expiration of the maximum of the term or terms specified in his sentence without regard to good time allowance.

9 D.C. Rules and Regulations § 105 (1972), provides:

GRANTING PAROLE — GENERAL

The granting of a parole is neither a constitutional or

statutory requirement, and release to parole supervision by Board action is not mandatory.

The statutory criteria for parole notes that:

> . . . Whenever it shall appear to the Board of Parole that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his release is not incompatible with the welfare of society, and that he has served the minimum sentence imposed or the prescribed portion of his sentence as the case may be, the Board may authorize his release on parole upon such terms and conditions as the Board shall from time to time prescribe . . .
>
> All Board decisions will be made by a majority of the members.

9 D.C. Rules and Regulations § 104.1 (1972), provides:

> **ELIGIBLE BY STATUTE**
>
> Title 24, Section 204, D.C. Code authorizes the Board to release a prisoner on parole in its discretion after he has served the minimum term or terms of the sentence imposed or after he has served one-third of the term for which he was sentenced as the case may be if:
>
> (a) He has observed substantially the rules of the institution.
>
> (b) There is reasonable probability that he will live and remain at liberty without violating the law.
>
> (c) In the opinion of the Board, such release is not incompatible with the welfare of society.

STATEMENT

Respondent, Roosevelt Brandon, is imprisoned at the Lorton Correctional Complex, a felony institution operated by the District of Columbia at Lorton, Virginia. He is serving a sentence for an armed rape that he committed while on parole from an earlier murder conviction. The District of Columbia Parole Board revoked parole on the murder conviction due to the armed rape. Brandon served an additional

51 months on his murder sentence before being reparoled from it to begin service of his consecutive armed rape sentence.

Brandon filed this action, under 42 U.S.C. § 1983, in the United States District Court for the District of Columbia. The action was filed, *in forma pauperis*, against the District of Columbia Board of Parole and the individual board members. He sought an order requiring the parole certificate to reflect parole on his murder conviction 24 months, rather than 51 months, after reincarceration, thus shortening the time he served for murder by two years and three months and beginning service of his armed rape sentence that much earlier. He also sought damages.

The District Court (Hart, J.) dismissed the action as frivolous, under 28 U.S.C. § 1915(d), prior to service of the summons and complaint. (A. 20) The District of Columbia Circuit reversed, and in its opinion (Mikva, J.) held that a "viable" equal protection claim had been stated and, without ruling on the merits of his due process claim, instructed the district court on remand to determine whether Brandon had a liberty interest in parole arising from, *inter alia*, informal administrative practices and internal directives of the Board (7a, 10a-11a).

Brandon was convicted of second degree murder in the District of Columbia on April 22, 1966, and he was sentenced to serve 10 to 30 years in prison for that offense. He served this sentence in District penal institutions, and the District of Columbia Parole Board determined that he would be eligible for parole beginning on March 26, 1975. The Board paroled him from his murder conviction sentence on April 11, 1975.

Seven months later, on November 11, 1975, Brandon was arrested on the charge of rape while armed. He pled guilty to that offense and was sentenced in the Superior Court of the District of Columbia to serve an additional 10 to 30 year sentence on the armed rape conviction. This sentence was made consecutive to the sentence on his prior murder conviction.

The Parole Board revoked Brandon's murder sentence parole on February 27, 1976. The revocation was based on the plea of guilty to commission of rape and his carrying the gun used in the rape.

On six occassions during the thirty-nine month period from November 15, 1976 to February 21, 1980, the Parole Board considered whether it would parole Brandon from service of his sentence on the murder conviction so that he could begin serving his armed rape sentence. The Board continued consideration once, denied parole four times, and granted parole on February 21, 1980.[1]

Brandon brought this action *pro se* alleging that the delay in granting reparole "was unfair and dilatory" and resulted in denial of plaintiff's due process rights." He also alleged that the Board had a customary policy of reparoling parole violators after twenty-four months and that the Board "departed from Board rules and regulations and/or customary reparoling policy, that is, plaintiff had served the average violator time required by the Board."

The district court granted Brandon leave to proceed without payment of costs, but before the complaint was served, dismissed the action *sua sponte*, stating:

> "Dismissed. States no cause of action. Parole Board is completely justified in getting all the information it can on a prisoner who has been convicted of murder and rape while armed." (App. G, 23a).

---

[1] On November 15, 1976, the Board continued the case until "receipt of the most recent presentence report." Brandon asserted that the Board should have had this information, because he had been sentenced seven months earlier.

On January 24, 1977, the Board denied reparole. Brandon asserted that its "reasons for denial were defective and insufficient."

On October 20, 1977, the Board denied reparole and requested a psychiatric report. Brandon asserted that the reason for denial was defec-

[Footnote continued on next page]

The court of appeals reversed.[2] It first held that a *pro se* complaint should not be dismissed *sua sponte* "if the complaint has at least *an arguable* basis in law and fact—if the complaint is *viable*. . . ." (5a, emphasis by the court). It than held that Brandon had stated a "viable" equal protection claim. The court concluded that Brandon's complaint was sufficient to withstand dismissal because it alleged that, in failing to reparole him for nearly four years, when parole violators were, on the average, reparoled within twenty-four months, the Parole Board "violated normal custom" (6a) and "violated the Plaintiff's rights" (7a). The court reasoned that allegations that the government has treated a plaintiff less favorably than others, when joined with allegations that "could be taken to suggest" that the government has acted from improper motives, are sufficient to state an equal protection claim. (7a).

The court did not decide the issue that had been dealt with most fully in the briefs—namely, whether a liberty interest, triggering procedural due process rights, is created by relevant statutes and regulations. However, it instructed the trial court that, on remand,

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tive and departed from "customary reparoling policy" in that appellant "had served the average violator time required by the Board."

On February 1, 1979, the Board denied reparole finding "itself in the dilemma of not having sufficient information on which to make a comfortable decision." Brandon asserted that the Board had had more than ample time to collect the information it needed.

On May 1, 1979, the Board denied reparole and continued the case until February 1980. Brandon asserted that the Board's reasons violated his rights.

On February 21, 1980, Brandon was reparoled and began service of his connsecutive rape sentence.

[2] Counsel was appointed to represent Brandon by the court of appeals and the case was fully briefed and argued.

> further factfinding is required to determine whether the Board's regulations *or its administrative practices* create a liberty interest in parole. Resolution of these claims *may depend upon the way in which the Board applies its regulations* and upon the degree of formality with which the Board's administrative practices are embossed. [10a, emphasis supplied].

Judge Starr (for himself and Judge Wilkey) dissented from the denial of rehearing *en banc* with reference to this aspect of the opinion. He stated that administrative practices—which may be changed at will by administrators—are too tenuous a basis on which to predicate a liberty interest. He stated:

> The [court's] opinion * * * suggest[s] that in determining the reach of the Due Process Clause's protection of liberty interests, the court must analyze . . . *"customary parole practices" of the Parole Board* to ascertain whether they must create a liberty interest by placing substantive limits on official discretion. *Id.* at 9 (emphasis added). It is this latter suggestion and the suggestion that fact-finding is necessary to resolve this issue with which I emphatically take issue. In my view, the Parole Board's practices or customs have absolutely no role to play in a proper analysis of whether a prisoner has a liberty interest in reparole under D.C. parole statute and regulations. Rather, as I stated in dissenting from the decision in *Lucas v. Hodges*, No. 83-1099 [730 F.2d at 1507] (Mar. 23, 1984), internal, informal policies developed by *prison administrators* do not provide an adequate basis for the implication of a liberty interest. In the setting of parole, the Supreme Court has made it abundantly clear that parole is a creature of statute and that in only a rare case will the statute give rise to a liberty interest by sufficiently circumscribing the authority of parole officials. *See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Moreover, the Court in *Greenholtz* in no way suggested that a parole board's practices or customs could give rise to a liberty interest. Other deci-

> sions concerning the creation of liberty interests, in fact, suggest just the opposite. *See Jago v. Van Curen*, 454 U.S. 14 (1981) (holding that a parole board decision to grant early parole did not give rise to a protected liberty interest); *see generally Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463-64 (1981). Thus, I disagree with the panel's suggestion that the D.C. Parole Board's customs and practices may give rise to protected liberty interests in parole and with the concomitant suggestion that discovery is necessary to resolve that issue. [20a-21a, emphasis in original].

REASONS FOR GRANTING WRIT

1. The District of Columbia Circuit has held that a prisoner can state a "viable" equal protection claim by simply alleging that a parole board has treated him differently from others and has done so in bad faith. Such allegations, the circuit instructed, require the parole board to state its reasons for denying parole and require the federal courts to review them to determine whether they are true reasons and are rational. The circuit stated, "[e]qual protection does require at the least, however, that the state act 'sensibly and in good faith.' " quoting, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1981) (Blackmun, J. concurring). (A.7).

The circuit's ruling effectively nullifies the Court's decision in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), because it holds that essentially the same facts which in *Dumschat* were held not to state a due process claim do state an equal protection claim.

The practical result of this decision is that every District of Columbia prisoner who has been denied parole can have the substance of the decision denying parole reveiwed by a federal judge in the United States District Court for the District of Columbia. That is because, historically, the majority of prisoners have been granted parole when they first

become eligible.[3] All prisoners denied parole have served more time than the statistical norm. Because the decision below will require the federal court to engage in extensive supervision of parole release decisions, it cannot be squared with *Dumschat's* teaching that such decisions "are rarely, if ever, appropriate subjects for judicial review," 452 U.S. at 464, relying on *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979).

2. The circuit also directed the district court to examine the parole board's informal administrative practices to assess whether those practices established a "liberty interest" requiring due process protection, under its earlier decision in *Lucas v. Hodges*, 730 F.2d 1493, vacated as moot, 738 F.2d 1392 (D.C. Cir. 1984). The Court should also review the holding in this case that such informal practices may give rise to a liberty interest. That holding threatens to abridge substantially the discretion of District of Columbia parole officials. It may result in the discovery by officials that they have inadvertantly created liberty interests in the past, and it will likely require them to avoid acting in ways which may unintentionally create such interests in the future. In addition, since in the circuit's view, liberty interests need not arise out of formal conduct with recognized legal effects, but can instead arise from informal official conduct, the ruling below will inevitably require the district courts in the District fo Columbia to undertake, and the District of Columbia parole officials to undergo, evidentiary proceedings in virtually every instance in which an inmate asserts that a liberty interest has been created. This too, will burden parole officials in performance of their responsibilities. Furthermore, this ruling is clearly contrary to the Court's teachings on

[3] Statistics submitted below to the court of appeals from annual reports of the Parole Board indicated that, on initial hearing 73% of those eligible for parole were granted parole in 1980; 65%, in 1981; and 61%, in 1982, and that at least 54% of those denied parole at the initial hearing were granted parole on the first hearing.

liberty interests in *Dumschat, supra; Jago v. Van Curen, supra; Hewitt v. Helms,* 459 U.S. 460; and *Olim v. Wakinekona,* 461 U.S. 238, 103 S.Ct. 1741.

THE EQUAL PROTECTION RULING

Under the decision below, all a prisoner need do to assert a "viable" equal protection claim is allege that he has served a greater portion of his sentence than the statistical norm (i.e., that he has served longer than "the average violator time required by the Board") and couple that allegation with assertions that the Board has been "dilatory" or that it has "violated Plaintiff's rights." (7a). The Parole Board must then state the reasons parole was denied, and the district court will examine them to determine "that the state act[ed] 'sensibly and in good faith' ". (7a) Those rulings cannot be squared with governing precedent.

The Court has unequivocally ruled that an allegation that an inmate has been refused release in circumstances where most inmates are released does not state a constitutional claim.

> No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Contstitution.

Connecticut Board of Pardons v. Dumschat, supra, 452 U.S. at 465. The reason for this is clear: each such decision requires an exercise of judgment based on individual circumstances. Each "turns on a discretionary assessment of a multiplicity of imponderables, entailing what a man is and what he may become rather than simply what he has done." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, supra,* 442 U.S. at 10.[4] Therefore, different

[4] The Court also stated that:

> * * * In parole releases, * * * few certainties exist. In each

[Footnote continued on next page]

considerations can produce similar parole decisions, while similar concerns (such as, for example, the demonstrated propensity to engage in violent crimes) in different cases can produce very different results.[5]

The District of Columbia Circuit, however, has fashioned a constitutional right out of just such statistical probabilities. Indeed, the facts in this case are in all essentials identical to those in *Dumschat*, where there was an overwhelming statistical showing that the complainant inmate had been treated less favorably than others similarly situated. See 452 U.S. at 462, n.4 (no more than 10 to 15% of inmates denied release in similar circumstances).[6] Nevertheless, the Court squarely held that the state could not be

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> case, the decision differs from the traditional mold of judicial decision making in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and the community. This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice. The entire inquiry is, in a sense, an "equity" type judgment that cannot always be articulated in traditional findings. [*Id.* at 8, footnote omitted]

[5] Different considerations might produce the same result where, for example, the Parole Board decided to release two prisoners, one because he had only a limited pre-incarceration record of criminal conduct, and another because, while he had an extensive record of pre-incarceration criminal conduct, his conduct after incarceration reflected a good deal of behavioral adjustment. Similar considerations might produce different results where, for example, the Board focused on the likelihood that parolees might engage in violent crime, and thus provide very different records with respect to engaging in violence.

[6] The allegations which the Circuit here interpreted as asserting bad faith make no essential difference. The statistics in *Dumschat* were sufficiently overwhelming to support an inference of "bad faith", had that been relevant. Furthermore, if conclusory allegations of bad faith were all that were required to avoid *Dumschat*, that decision would be drained of all practical meaning.

compelled to give its reasons for refusing to release him. On the same facts, the circuit's decision here would require that those reasons be stated and reviewed, under the guise of the equal protection guarantee.

That guarantee, however, fits no better here than it would in *Dumschat*. In light of the decisional process involved, in neither case is the fact that the complainant was treated less favorably than others, without more (such as an allegation that this occurred because of race or perhaps some other class characteristic) sufficient to reflect invidious or arbitrary treatment. Furthermore, there are strong policy reasons why more should be required, namely, that extensive judicial oversight of a parole board's decisions would not only create substantial burdens for a board, but might also prevent it from exercising its best judgment, by creating a bias against evaluative and predictive components of its decisions in favor of more objective factors. Accordingly, without additional cause, there is no warrant for the federal courts to intrude themselves into the difficult evaluative judgments which parole boards are required to make

THE DUE PROCESS RULING

The Circuit Court reaffirmed its prior ruling in *Lucas v. Hodges*, *supra*, that informal policy statements and customary administrative practices may give rise to a liberty interest, and directed the district court to determine whether such an interest arises here out of the way in which the Board applies its regulations or the nature of its administrative practices. (10a). That ruling constitutes a precedent that will impose considerable constraints on parole and prison administrators without legal justification.[7]

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[7] The controlling District of Columbia statute provides that, after making relevant determinations, the Parole Board "may authorize his [the

[Footnote continued on next page]

The Court has repeatedly stressed that "the administrators of our penal systems need considerable latitude in operating those systems and that the protected interests of prisoners are necessarily limited . . ." *Jago v. Van Curen, supra,* 454 U.S. at 18, *citing Meachum v. Fano,* 427 U.S. 215, 225. *See also Hewitt v. Helms,* 459 U.S. 460, 476; *Olim v. Wakinekona,*——U.S.——, 103 S. Ct. 1741, 1745; *Montanye v. Haymes,* 427 U.S. 236, 242. The Court, therefore, has recognized inmate liberty interests in only two sets of circumstances: where the prison administrator's conduct will radically transform the amount of freedom an inmate enjoys in ways that could not reasonably be anticipated to result from the incarcertion involved, or where the government has made a clear choice to provide binding restrictions on parole or corrections officials' discretion. *See, e.g., Hewitt v. Helms, supra,* 459 U.S. at 466-72; *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, supra,* 442 U.S. at 11-12. Neither of those circumstances exisits here.

Because the decision below holds that liberty interests can be created by informal means which ordinarily have no legal consequences, it does not permit the government to make clear choices as to when, and to what extent, it will limit the discretion corrections officials would otherwise have. Indeed, because such interests can arise from informal documents, from documents without clear mandatory language, and from understandings and courses of conduct, corrections and parole officials may discover after the fact

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inmate's] release on parole upon such terms and conditions as the Board shall from time to time prescribe." D.C. Code 1981, § 24-204(a). The rules of the Board provide that § 24-204(a), "authorizes the Board to release a prisoner on parole *in its discretion* "once it determines that the criteria set out in the section are met. 9 D.C.R.R. § 104.1. Board rules additionally provided that:

> The granting of a parole is neither a constitutional or statutory requirement, and release to parole supervision by board action is not mandatory. [9 D.C.R.R. §105].

that the scope of their discretion has been limited. In fact, the only sure way to avoid creating such liberty interests would seem to be to avoid a rational administration: to eschew the issuance of clear and uniform directives and to avoid acting with consistency. In addition, because the decision below has eliminated any clear demarcation between what may, and what may not, give rise to a liberty interest, prison administrators and parole officials will inevitably be subjected to numerous evidentiary proceedings attempting to assess whether there have been understandings or courses of conduct sufficient to create such interests.

As indicated by the dissent from denial of *en banc* review, the decision in this case is contrary to Court precedent. *Connecticut Board of Pardons v. Dumschat, supra*, squarely rejects the proposition that liberty interests can arise out of consistent administrative practices:

> A constitutional entitlement cannot "be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past."

452 U.S. at 466. *Jago v. Van Curen, supra*, 454 U.S. at 19, squarely rejected the view that liberty interests may arise out of official and/or inmate "understandings":

> We would severely restrict the necessary flexibility of prison administrators and parole authorities were we to hold that any one of their myriad decisions with respect to individual inmates may, as under the general law of contracts, give rise to protected "liberty" interests which could not thereafter be impaired without a constitutionally mandated hearing under the Due Process Clause.

Furthermore, because the decision below indicates that liberty interests can be created by official conduct which ordinarily has no binding legal effect, and because it holds that no clear mandatory language is required, it is inconsistent with a central teaching of *Hewitt v. Helms, supra*, and *Olim v. Wakinekona, supra*, and the cases those precedents build

upon. All of those cases require that, in order to support the creation of a liberty interest, there must be a showing that the government has clearly chosen to limit the discretion of administrators in an unmistakable and legally binding way. As indicated by the dissent below, informal memoranda and administrative practices are not a sufficiently binding constraint on official discretion to give rise to a constitutionally-protected liberty interest.

Since he had no constitutionally-protected liberty interest here, it is clear that, as a matter of law, Brandon was not entitled to due process protections. Therefore the remand in this case, and similar inquiries that will be mandated by the Circuit ruling below, will require the expenditure of considerable governmental and judicial resources for no legally defensible reason.

CONCLUSION

The petition for a writ of certiorari, to review the decision of the United States Court of Appeals for the District of Columbia, should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1100

ROOSEVELT BRANDON, APPELLANT

v.

DISTRICT OF COLUMBIA BOARD OF PAROLE, ET AL.

On Appeal from the United States
District Court for the District of Columbia
(Civil Action No. 83-00007)

Argued January 24, 1984

Decided May 8, 1984

Andrew J. Pincus (Appointed by this Court), with whom *Gerald Goldman* was on the brief, for appellant.

Edward E. Schwab, Assistant Corporation Counsel, with whom *Charles L. Reischel*, Deputy Corporation Counsel, was on the brief, for appellees.

Before: WALD and MIKVA, *Circuit Judges*, and VAN DUSEN,* Senior Circuit Judge for the Third Circuit.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: Appellant Roosevelt Brandon filed a *pro se* complaint seeking declaratory, injunctive, and monetary relief against the District of Columbia Board of Parole (the Board) and its individual members for alleged violations of 42 U.S.C. § 1983. Brandon claimed that the District of Columbia parole process is subject to the due process clause of the Fifth Amendment and that the Board's delay in considering his case, its failure to supply adequate reasons for its parole decisions respecting him, and its failure to reparole him in the same time period in which other similarly situated prisoners were reparoled violated his constitutional rights. The district court granted Brandon leave to proceed *in forma pauperis* but then dismissed the complaint *sua sponte* before it was served on the defendants. We reverse that *sua sponte* dismissal and remand for fuller consideration of the merits of his claim. As we have repeatedly emphasized, *sua sponte* dismissal of a *pro se* complaint is warranted only when a prisoner's claim is "frivolous" or "malicious," 28 U.S.C. § 1915(d), and this is clearly not such a case.

Brandon is not a sympathetic plaintiff. In 1966 he was convicted of murder and sentenced to a term of ten to thirty years. He was paroled in April 1975. Shortly after that, on November 11, 1975, he was arrested and charged with the offense of rape while armed. He pleaded guilty to that charge and received a consecutive sentence of ten to thirty years. Prior to the imposition of this sentence, the Board revoked Brandon's original parole. Because Brandon's second sentence was to be consecutive

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

with his first, he could not begin serving his second term until he had served out his time on the first sentence or was reparoled on the first conviction. Brandon came before the Board for reparole five times between November 15, 1976 and February 21, 1980 before he was finally reparoled.

Brandon alleged that the average parole violator in his circumstances would have been reparoled in twenty-four months rather than the nearly four year wait to which he was subjected. Specifically, Brandon asserted that the failure to reparole him before 1980 "departed from Board rules and regulations and/or customary reparoling policy . . . ." Record Excerpts at 7. As part of his prayer for relief, Brandon asked for an order that the Board amend his certificate of parole to reflect reparole after twenty-four months. He also sought punitive and compensatory damages against the Board members.

The district court dismissed the action *sua sponte* with the following terse statement:

> Dismissed. States no cause of action. Parole Board is completely justified in getting all the information it can get on a prisoner who has been convicted of murder and rape while armed.

As this statement reveals and as the Board admits, "the District Court appeared to be less concerned with appellant's [constitutional claims] than with the nature of his crimes." Appellee Brief at 5. The fact that Brandon is not a sympathetic plaintiff, however, does not justify suspending the Constitution with respect to him. Because Brandon's complaint cannot be labelled frivolous or malicious, the Board should be required to answer Brandon's complaint, and the district court should, after whatever fact finding proves necessary, address the merits of the substantial constitutional questions presented by this case.

DISCUSSION

Brandon's complaint was brought into federal court under the auspices of 28 U.S.C. § 1915, which authorizes federal courts to entertain actions *in forma pauperis* in an effort to assure that "no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, 'in any court of the United States' solely because his poverty makes it impossible for him to pay or secure the costs." *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948). At the same time that it sought to lower judicial access barriers to the poor, Congress was also concerned that opening the courthouse doors at no cost might lead to a flood of insubstantial or malicious lawsuits. In response to this concern, Congress included in Section 1915 a provision allowing early dismissal of those claims which "the court . . . is satisfied [are] frivolous or malicious." 28 U.S.C. § 1915 (d). As the Third Circuit has cogently explained, however, this provision does not "permit a cursory treatment of meritorious complaints. When a *viable* complaint is filed *in forma pauperis*, the pauper must be treated like all other litigants in the decision to dismiss." *McTeague v. Sosnowski*, 617 F.2d 1016, 1019 (3d Cir. 1980) (emphasis added). The discretion to dismiss *sua sponte* "may not be exercised arbitrarily and is limited . . . in every case by the language of the statute itself which restricts its application to complaints found to be 'frivolous or malicious.'" *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979).

In this case, there is nothing in the complaint itself or in the district court's summary dismissal of it to suggest that the complaint was malicious. Accordingly, the district court's *sua sponte* dismissal can be sustained only if Brandon's complaint can be styled frivolous.

This circuit has not yet defined with precision the test for frivolity under Section 1915(d). We did recognize in *Crisafi v. Holland*, 655 F.2d 1305, 1308 (D.C. Cir.

1981), that "[a] court may dismiss as frivolous complaints reciting bare legal conclusions with no *suggestion* of supporting facts, or postulating events and circumstances of a wholly fanciful kind." (emphasis added). But under the notice theory of pleading, it is not necessary that those facts be identified with specificity in the complaint itself. If it appears that the complainant could, after discovery, offer facts which would validate the complaint, *sua sponte* dismissal is premature.

It is also true that "[a] *pro se* complaint, like any other, must present a claim upon which relief can be granted by the court." *Id.* That statement, however, cannot be taken to mean that a frivolous complaint is one which could not survive a Rule 12(b)(6) motion to dismiss. On the contrary, the test for frivolity cannot be the same as the test for whether a complaint would survive a 12(b)(6) motion to dismiss. When a Rule 12(b)(6) motion is filed, the plaintiff is put on notice that the legal sufficiency of the complaint is being challenged and is often given some insight into the theory upon which that challenge is made. The plaintiff then has an opportunity to develop his claim further by filing an opposition to the Rule 12(b)(6) motion. Alternatively, the plaintiff may seek to show that decision on the motion would be premature before the facts were further drawn out through discovery. Neither of these opportunities, nor the sharply honed adversarial exchange involved in a Rule 12(b)(6) motion and opposition, are present when dismissal is *sua sponte*. *Sua sponte* dismissal is therefore a much more truncated process than is dismissal under Rule 12(b)(6). In giving effect to the intent with which Congress created the narrow exception in section 1915(d) for *sua sponte* dismissals, this difference must be taken into account. Accordingly, we hold that a complaint need not indisputably state a cause of action to survive *sua sponte* dismissal; instead, if the complaint has at least *an arguable* basis in law and fact—if the complaint is *viable*—it cannot be deemed frivolous. *See Watson v.*

Ault, 525 F.2d 886 (5th Cir. 1976) (adopting same standard); *cf. Anders v. California*, 386 U.S. 738 (1967) (defining frivolous appeal as one without "arguable" merit). Instead, the filing of responsive papers should be required and the normal course of litigation pursued. Following this course assures that proper adversarial attention is paid to the question whether a cause of action exists and facilitates appellate review of this question. This is particularly true when the existence *vel non* of the cause of action depends on the resolution of factual issues. If discovery and the creation of an evidentiary record could affect disposition of the legal questions raised, *sua sponte* dismissal is wholly unwarranted. Dismissal of *pro se* suits under the frivolous standard must therefore be reserved for those cases in which there is indisputably absent any factual and legal basis for the asserted wrong.

Judged by these standards, Brandon's complaint was improperly shortcircuited. One of Brandon's allegations was that he had been denied "due process of law because the Defendants . . . have violated normal parole custom and adjective rules and regulations." Record Excerpts at 4. The complaint develops this allegation further when it states that "the Board's stated reasons for this denial were defective and the decisions departed from Board rules and regulations and/or customary reparoling policy, that is, Plaintiff had served the average violator time required by the Board." *Id.* at 7. As his appointed counsel points out on appeal, construed under the liberal rules applicable to *pro se* pleadings, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), these allegations can be characterized as presenting a claim under equal protection principles, especially in light of the fact that, with respect to the District of Columbia, those principles are incorporated in the Due Process Clause itself, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). This equal protection claim is clearly substantial enough to survive *sua sponte* dismissal.

A prisoner need not always allege the presence of a suspect classification or the infringement of a fundamental right in order to state a claim under the equal protection component of the Fifth Amendment. Even in the absence of a fundamental right or a suspect classification, equal protection requires that a classification between similarly situated individuals bear some rational relationship to a legitimate state purpose. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). That does not suggest that courts are empowered to interfere excessively with the wide latitude prison officials must be accorded in the administration of prison affairs, *Cruz v. Beto*, 405 U.S. 319, 321 (1972). Nor does it require us today to decide whether "random acts of goverment misconduct," in the form of departures from statistically generated parole probabilities, in and of themselves constitute cognizable equal protection claims. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438 (1981) (Blackmun, J., concurring). Equal protection does require at the least, however, that the state act "sensibly and in good faith," *id.* at 439; parole decisions, like all other forms of state action, cannot be based on impermissible purposes. Yet liberally construed, Brandon's complaint in fact suggests that the Board purposefully singled him out for harsher treatment than that accorded to similarly situated prisoners. For example, the complaint claims that it was "dilatory" for the Board twice to postpone decision on the merits of Brandon's reparole. That assertion could be taken to suggest that the Board intentionally delayed acting on Brandon's case simply to punish him rather than to obtain sufficient information about him to make an intelligent parole decision. Similarly, the allegation that the Board's reasons for refusing to reparole Brandon at a May 1, 1979 hearing "violated Plaintiff's rights" can be construed to assert that the Board's refusal was based on illegitimate purposes.

The situation thus described is much the same as that in *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978).

There a prisoner alleged that prison officials had violated equal protection by revoking his work-release status without affording him the same kind of hearing allegedly given to other participants in the program. In reversing the district court's dismissal for failure to state a claim, the Seventh Circuit first noted that a § 1983 complaint, as is Brandon's complaint, need not identify with particularized facts the class of which he is allegedly a part; instead that task is to be left to discovery or to resolution on a Rule 12(e) motion for a more definite statement. The Seventh Circuit then went on to hold: "The defendants may be able to establish the rationality of treating plaintiff differently. But a court ought not dismiss an equal protection claim on the basis of reasons unrevealed to the court. The state must come forward and identify the legitimate state interest being furthered." *Id.* at 1372 (citations omitted). *Accord Ciechon v. City of Chicago*, 686 F.2d 511, 523-24 (7th Cir. 1982) (employee discharge); *Williams v. Taylor*, 677 F.2d 510, 516-17 (5th Cir. 1982) (disenfranchisement); *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981) (discharge of police officer); *Stringer v. Rowe*, 616 F.2d 993, 997-98 (7th Cir. 1980) (interprison transfer); *Jones v. Lane*, 568 F. Supp. 1113, 1116 (N.D. Ill. 1983) (placement in prison work release program). Brandon's equal protection claim is thus potentially meritorious, and his complaint sufficiently apprised the defendants of this claim that they should have been required to prepare an answer, *see Conley v. Gibson*, 355 U.S. 41 (1957); any further definition of Brandon's equal protection claim should have been left to discovery. We therefore reverse the *sua sponte* dismissal of Brandon's equal protection claim.

In light of our disposition of the equal protection claim, we also choose to remand Brandon's procedural due process claims without deciding whether those claims state a cause of action. We note, however, that those claims raise substantial issues of first impression in this circuit. Whether due process guarantees apply to parole

or reparole decisions depends as a threshold matter on whether the District of Columbia parole system creates a liberty interest in parole. *See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (liberty interests in parole do not arise from Constitution and must therefore be grounded in state or local law). Brandon argues that the parole statute, 24 D.C. Code § 204(a), the Board's regulations adopted to carry out that statute, D.C.R. & Regs. tit. 9, ch. 2 § 105.1 (1982), and the customary parole practices of the Board all independently "create[] a protected liberty interest by placing substantive limits on official discretion." *Olim v. Wakinekona*, 103 S. Ct. 1741, 1747 (1983). We hold that each of these claims is sufficiently non-frivolous to warrant full consideration by the district court.

Brandon's statutory claim asks this circuit to enter into the fray concerning parole that has followed in the wake of the Supreme Court's holding in *Greenholtz, supra*. There the Court found that Nebraska had created a substantive liberty interest in parole by ordering that parole "shall" be granted "unless" the parole board made one of four enumerated determinations. Since *Greenholtz*, lower courts have struggled to determine whether a parole statute must be drafted in this shall/unless formulation to create a liberty interest in parole, or whether instead a statute that makes parole decisions less than wholly discretionary suffices to create such an interest. *Compare Booth v. Hammock*, 605 F.2d 661 (2d Cir. 1979) (*Greenholtz* makes shall/unless formulation decisive) and *Slocum v. Georgia State Board of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982) (same) *with Winsett v. McGinnes*, 617 F.2d 996, 1007 (3rd Cir. 1980), *cert. denied sub nom. Anderson v. Winsett*, 449 U.S. 1093 (1981) (liberty interest arises when discretionary decisions must be exercised consistently with a statutory policy that is embodied in specific criteria) (work release program) and *Bowles v. Tenant*, 613 F.2d 776, 778 (9th Cir. 1980) (describing mandatory language of *Greenholtz* as an "im-

portant" factor in creation of liberty interest). *See generally Anderson v. Winsett*, 449 U.S. 1093, 1095 (1981) (White, J., dissenting from the denial of the petition for certiorari) (noting conflict in circuit court's interpretations of *Greenholtz*). In the District, the relevant statute provides that the parole board, after making certain specific determinations, "may authorize" release on parole, 24 D.C. Code § 204(a) (1981); the statute does not contain the shall/unless formulation present in *Greenholtz*. Whether this statute creates a liberty interest in parole thus requires this court to choose between the *Booth* and *Winsett* interpretations of *Greenholtz*. To be asked to make this choice between the opposing approaches of two courts of appeals can hardly be labelled a frivolous legal task. Accordingly, while we express no view on the merits of Brandon's statutory claim, the district court's *sua sponte* dismissal of that claim was inappropriate.

We also hold that further factfinding is required to determine whether the Board's regulations or its administrative practices create a liberty interest in parole. Resolution of these claims may depend upon the way in which the Board applies its regulations and upon the degree of formality with which the Board's administrative practices are embossed. While we need not decide today whether informal and merely customary administrative practices can ever give rise to a liberty interest in parole, it suffices for today's decision that such practices clearly can have such effect at least when they are sufficiently formalized. That is the import of our recent decision in *Lucas v. Hodges*, No. 83-1099 slip op. (D.C. Cir. March 23, 1983), in which we held that official statements of prison policy contained in internal directives can give rise to constitutionally protected liberty interests. In light of our decision in *Lucas*, should discovery reveal that the Board exercises its parole and reparole decisions according to a set of formalized internal criteria that significantly confine official discretion, Brandon's due process

claims would be considerably strengthened. Summary dismissal of the claims that the Board's regulations or its practices create a liberty interest in parole was therefore also inappropriate. Thus, we remand all of Brandon's procedural due process claims so that appellate review of these important issues can be facilitated.

Our decision today reinstates the entirety of Brandon's complaint. As a result, this case illustrates the waste of resources entailed in erroneous *sua sponte* dismissals. Because the issues on appeal potentially raised important constitutional questions, we appointed counsel to represent Brandon before this court. That counsel thoroughly briefed the relevant issues and ably argued Brandon's case. With our decision that appellate review of this case cannot take place until discovery is completed, the issues narrowed, and a fuller record compiled, it seems clear that, after remand, Brandon's theories will once more be briefed and argued to this court. Such duplicative use of appointed counsel and of this court's scarce resources is hardly sensible and could have been avoided by more considered treatment at the district court level of Brandon's complaint. For this reason, we have repeatedly sought to impress upon district judges that "*sua sponte* dismissal would almost always seem less preferable than requiring at least some responsive answer from the government entity or official named as defendant." *Redwood v. Council of the District of Columbia*, 679 F.2d 931 (D.C. Cir. 1982). *Accord Bayron v. Trudeau*, 702 F.2d 43, 45 (2d Cir. 1983) ("sua sponte dismissal of a pro se prisoner petition before service of process and the filing of a response by the state is strongly disfavored"). The power to dismiss *sua sponte* must be reserved for cases in which a *pro se* complaint is so frivolous that, construing it under the liberal rules applicable to *pro se* complaints, there still remains no arguable legal or factual basis upon which the complaint could go forward.

On remand, we also urge the district court to use its power under § 1915 (d) to appoint counsel so that the important issues raised by Brandon's complaint will be fully aired. To minimize further duplicative effort, it may be most efficient to appoint the same counsel whom this court appointed to litigate Brandon's appeal; the same issues which have been briefed and argued on appeal will form the basis for further proceedings in the district court. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1100
CIVIL ACTION No. 83-00007

ROOSEVELT BRANDON, *Appellant*

v.

DISTRICT OF COLUMBIA, BOARD OF PAROLE, ET AL.

APPEAL FORM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

BEFORE: WALD AND MIKVA, *Circuit Judges*, AND VAN DUSEN, **Senior Circuit Judge for the Third Circuit.*

JUDGEMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERD and ADJUDGED, by this Court, that the order of the District Court on appeal herein is reversed and this case is remanded for further proceedings consistent with the Opinion of this Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: May 8, 1984
Opinion for the Court filed by Circuit Judge Mikva.
*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1100
CIVIL ACTION No. 83-00007

ROOSEVELT BRANDON, *Appellant*

v.

DISTRICT OF COLUMBIA, BOARD OF PAROLE, ET AL.

BEFORE: WALD AND MIKVA, *Circuit Judges*, AND VAN DUSEN, **Senior Circuit Judge for the Third Circuit.*

ORDER

It is ORDERED, by the Court, *sua spote*, that the Opinion for the Court filed by Circuit Judge Mikva on May 8, 1984 be, and hereby is, amended as follows:

Page 8, first paragraph, delete the second sentence from the end in its entirety and substitute in lieu thereof the following:

Brandon's equal protection claim is thus potentially meritorious, and his complaint sufficiently appraised the defendants of this claim, that they should have been required to prepare an answer or otherwise plead *see Conley v. Gibson*, 355 U.S. 41 (1957); it was error to have dismissed the complaint *sua sponte* and thereby to cut short the normal course of litigation. Typically, this course would include the filing of an answer by the government followed by a response from Brandon in which he sought to establish that a cause of action was stated under the facts of his case or to

amend his complaint so that it did state a cause of action. Should pertinent material facts remain in dispute after these exchanges, discovery could also be warranted. We therefore need not and do not hold that the equal protection claim actually states a cause of action to hold that, since it is sufficiently plausible that the claim could state a cause of action, the government must for now prepare at least an answer.

Page 11, first full paragraph, delete the fifth sentence in its entirety and substitute in lieu thereof the following:

With our decision that appellate review of this case cannot take place until further proceedings below have been completed, the issues narrowed, and a fuller record compiled, it seems clear that, after remand, Brandon's theories will once more be briefed and argued to this court.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1100
CIVIL ACTION No. 83-00007

ROOSEVELT BRANDON, *Appellant*

v.

DISTRICT OF COLUMBIA, BOARD OF PAROLE, ET AL.

BEFORE: WALD AND MIKVA, *Circuit Judges*, AND VAN DUSEN, **Senior Circuit Judge, United States Court of Appeals for the Third Circuit.*

ORDER

On consideration of the Petition for Rehearing of Appellant, field June 6, 1984, it is

ORDERED BY THE Court that the aforesaid Petition for Rehearing is denied.

Per Curiam
For The Court

GEORGE A. FISHER *Clerk*
By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1100
CIVIL ACTION No. 83-00007

ROOSEVELT BRANDON, *Appellant*

v.

DISTRICT OF COLUMBIA, BOARD OF PAROLE, ET AL.

BEFORE: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA AND STARR, *Circuit Judges,*

ORDER

The Suggestion for Rehearing *en banc* of Appellant, filed June 6, 1984, has been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam
For The Court

GEORGE A. FISHER *Clerk*
By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

A statement of Circuit Judge Ginsburg, joined by Circuit Judges Bork and Scalia, is attached.

A dissenting statement of Circuit Judge Starr, joined by Circuit Judge Wilkey, is also attached.

No. 83-1100

ROOSEVELT BRANDON,

v.

DISTRICT OF COLUMBIA, BOARD OF PAROLE, ET AL.

GINSBURG, Circuit Judge: The court's opinion clarifies that (1) *sua sponte* dismissals of pro se complaints are reserved for plainly frivolous cases; and (2) when a pro se pleading, generously read, is not plainly frivolous, disposition should abide service of the complaint and a response to it. As I read the opinion, discovery is not to be permitted as a matter of course; instead, discovery should be allowed only when the parties' submissions reveal as a tenable prospect the presence of a genuine issue of material fact. On that understanding, I vote to deny the suggestion for rehearing *en banc*.

No. 83-1100

ROOSEVELT BRANDON,

v.

DISTRICT OF COLUMBIA, BOARD OF PAROLE, ET AL.

STARR, Circuit Judge, *dissenting:* I agree entirely with the substance of Judge Ginsburg's statement. I nonetheless respectfully dissent form the court's denial of the suggestion for rehearing en banc of this case.

The panel opinion in this case rightly concludes that a *pro se* complaint may be dismissed *sua sponte* without requiring any responsive pleading under 28 U.S.C. § 1915(d) only when the complaint is plainly frivolous or malicious, and that the complaint in this case did not fall below that minimal standard. The opinion, however, reaches far beyond this straightforward holding and unnecessarily states that Mr. Brandon's complaint raises "substantial issues of first impression in this circuit." Panel Opinion at 8.

The opinion then goes on to suggest that in determining the reach of the Due Process Clause's protection of liberty interests, the court must analyze the District of Columbia parole statute, the regulations promulgated thereunder, *and "customary parole practices" of the Parole Board* to ascertain whether they create a liberty interest by placing substantive limits on official discretion. *Id.* at 9 (emphasis added). It is this latter suggestion and the suggestion that fact-finding is necessary to resolve this issue with which I emphatically take issue. In my view, the Parole Board's practices or customs have absolutely no role to play in a proper analysis of whether a prisoner has a liberty interest in reparole under the D.C. parole statute and regulations. Rather, as I stated in dissenting from the decision in *Lucas v. Hodges*, No. 83-1099 (Mar. 23, 1984), internal, informal policies

developed by *prison administrators* do not provide an adequate basis for the implication of a liberty interest. In the setting of parole, the Supreme Court has made it abundantly clear that parole is a creature of statute and that in only a rare case will the statute give rise to a liberty interest by sufficiently circumscribing the authority of parole officials. *See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979). Moreover, the Court in *Greenholtz* in no way suggested that a parole board's practices or customs could give rise to a liberty interest. Other decisions of the Court concerning the creation of liberty interests, in fact, suggest just the opposite. *See Jago v. Van Curen,* 454 U.S. 14 (1981) (holding that a parole board decision to grant early parole did not give rise to a protected liberty interest); *see generally Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 463-64 (1981). Thus, I disagree with the panel's suggestion that the D.C. Parole Board's customs and practices may give rise to protected liberty interests in parole and with the concomitant suggestion that discovery is necessary to resolve that issue.

APPENDIX F

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1100
CIVIL ACTION No. 83-00007

ROOSEVELT BRANDON, *Appellant*

v.

DISTRICT OF COLUMBIA, BOARD OF PAROLE, ET AL.

BEFORE: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA AND STARR, *Circuit Judges,*

ORDER

It is ORDERED by the Court, *sua sponte,* that the *en banc* Order of July 11, 1984 is amended by deleting the first footnote and inserting in lieu thereof the following new footnote:

> A statement of Circuit Judge Ginsburg, joined by Circuit Judges Wright, Bork and Scalia, is attached.

Per Curiam
For The Court

GEORGE A. FISHER *Clerk*
By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX G

Order of the United States District Court for the District of Columbia (the Honorable George L. Hart, Jr.), entered on January 4, 1983, which dismissed the complaint in *Roosevelt Brandon v. District of Columbia Board of Parole, et al.*, C.A. No. 83-0007.

> Dismissed. States no cause of action. Parole Board is completely justified in getting all the information it can on a prisoner who has been convicted of murder and rape while armed.

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No. 84-714 (9)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

District of Columbia Board of Parole, et al.,

Petitioners,

v.

Roosevelt Brandon,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Motion for Leave to Proceed
In Forma Pauperis

Respondent Roosevelt Brandon hereby moves for leave to proceed in forma pauperis in the above-captioned action.

1. As stated in the accompanying affidavit, respondent Roosevelt Brandon, an inmate in Lorton Correctional Complex, is unable to pay the costs of responding to the petition for certiorari. He has been incarcerated for most of the past 19 years and has no significant assets.

2. Mr. Brandon was granted leave to proceed in forma pauperis in the United States District Court for the District of Columbia in Civil Action No. 83-00007, and by the United States Court of Appeals for the District of Columbia

14/42

Circuit in No. 83-1100, the decision on which the writ of certiorari is sought.

Respectfully submitted.

Gerald Goldman
Peter A. Barnes
Donna E. Patterson

HUGHES HUBBARD & REED
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6200

Attorneys for Respondent
Roosevelt Brandon

November 1984

No. 84-714

In The

SUPREME COURT OF THE UNITED STATES

October Term 1984

DISTRICT OF COLUMBIA BOARD OF PAROLE, et al.,

Petitioners,

v.

ROOSEVELT BRANDON,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

AFFIDAVIT OF RESPONDENT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Roosevelt Brandon, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, or to print the briefs herein, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to respond to the petition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition are true.

1. Are you presently employed?

Answer: No. I am an inmate at Lorton Correctional Complex.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: I have a small savings account at the Industrial Bank of Washington.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: When I was employed at Lorton I sent most of my pay to help support my son, Roosevelt Brandon, Jr., who currently resides with his grandmother in South Carolina.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Roosevelt Brandon

Roosevelt Brandon

SUBSCRIBED AND SWORN TO before me this ____ day of November, 1984.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor, and submit briefs in typewritten form.

15 November 84
Emily M. Jeffries
11/8/84

No. 84-714

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

District of Columbia Board of Parole, et al.,

Petitioners,

v.

Roosevelt Brandon,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Gerald Goldman*
Peter A. Barnes
Donna E. Patterson

HUGHES HUBBARD & REED
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6200

Attorneys for Respondent
Roosevelt Brandon

*Counsel of Record

November 1984

Issue Presented

Whether the Court of Appeals correctly decided that, under the liberal rules of construction applied to *pro se* pleadings, the complaint in this case is not frivolous within the meaning of 28 U.S.C. § 1915(d) and thus cannot be dismissed *sua sponte* prior to service on the defendants?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT	1
REASONS FOR DENYING THE WRIT	3
CONCLUSION	5

TABLE OF AUTHORITIES

Page

CASES:

Ashwander v. TVA,
297 U.S. 288 (1936)..... 5

Boyce v. Alizaduh,
595 F.2d 948 (4th Cir. 1979)..... 4

Estelle v. Gamble,
429 U.S. 97 (1976)..... 4

Haines v. Kerner,
404 U.S. 519 (1972)..... 4

Henriksen v. Bentley,
644 F.2d 852 (10th Cir. 1981)..... 4

Holloway v. Gunnell,
685 F.2d 150 (5th Cir. 1982)..... 4

Hughes v. Rowe,
449 U.S. 5 (1980)..... 4

Lucas v. Hodges,
730 F.2d 1493 (D.C. Cir.),
vacated, 738 F.2d 1392 (D.C. Cir. 1984)..... 3

Robles v. Coughlin,
725 F.2d 12 (2d Cir. 1983)..... 4

STATUTES:

28 U.S.C. § 1915(d)..... 2, 3, 4

RULES AND REGULATIONS:

Fed. R. Civ. P. 12(b)(6)..... 2, 4

31 D.C. Reg. 5777 (Nov. 16, 1984)..... 4

No. 84-714

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

District of Columbia Board of Parole, et al.,

Petitioners,

v.

Roosevelt Brandon,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The petitioners in this case ask the Court to address two substantive questions concerning the right of prisoners to challenge parole decisions. In their eagerness to attack the decision of the Court of Appeals, however, the petitioners ignore what was actually decided and the procedural posture in which this case now rests.

This action was initiated by a pro se complaint. The District Court granted Brandon leave to proceed in forma pauperis and then dismissed the complaint sua sponte before it was served on the defendants, stating only:

> "Dismissed. States no cause of action. Parole Board is completely justified in getting all the information it can get on a prisoner who has been convicted of murder and rape while armed."

The Court of Appeals granted Brandon leave to proceed on appeal in forma pauperis and appointed counsel for him. After full briefing and argument, the Court of Appeals reversed the sua sponte dismissal and remanded for further proceedings.

The decision of the Court of Appeals was not a judgment on the merits of Brandon's claims. It was not even a decision that the complaint stated a claim that could survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The only issue decided by the Court of Appeals was that, under the liberal rules of construction applied to pro se pleadings, the complaint in this case was not "frivolous" within the meaning of 28 U.S.C. § 1915(d) and, therefore, could not be dismissed sua sponte prior to service on the defendants. The panel decision was unanimous, and even the two judges who dissented from the Court of Appeals' denial of rehearing en banc agreed that the complaint was not frivolous and should not have been dismissed. (Pet. App. at 20a.)

Despite the petitioners' contrary assertions, the reach of the Court of Appeals' decision is extremely limited. According to the Board of Parole, the Court of Appeals decided that the allegations of Brandon's complaint "are sufficient to state an equal protection claim." (Petition at 6.) That is incorrect. The Court of Appeals stated only that the allegations in Brandon's complaint "can be characterized as presenting a claim under equal protection principles" and that "Brandon's equal protection claim is thus potentially meritorious." (Pet. App. at 6a, 8a & 14a; 734 F.2d at 60-61 (emphasis added).) In the order amending the opinion below (Pet. App. 14a-15a), the Court of Appeals explicitly stated that:

> "We therefore need not and do not hold that the equal protection claim actually states a cause of action to hold that, since it is sufficiently plausible that the claim could state a cause of action, the government must for now prepare at least an answer." (Emphasis added.)

Similarly, the Court of Appeals explicitly chose to "remand Brandon's procedural due process claims without deciding whether those claims state a cause of action." (Pet. App. at 8a; 734 F.2d at 61.) The court first refused to decide whether the D.C. parole statute creates the liberty interest in parole necessary to invoke due process guarantees. (Pet. App. at 9a-10a; 734 F.2d at 61-62.) The court then declined to determine whether any D.C. parole regulations or administrative practices give rise to a protected liberty interest, since further factfinding was required to determine what rules and practices the Parole Board in fact follows and with wnat degree of formality. (Pet. App. at 10a; 734 F.2d at 62.) It sufficed for the Court of Appeals that Brandon's allegations regarding the D.C. statute and administration thereunder raised arguable claims that the district court could not peremptorily cut off by sua sponte dismissal.*/

REASONS FOR DENYING THE WRIT

1. Understandably, given the procedural posture of the case, the Court of Appeals did not decide the issues on which the Board of Parole now seeks review. Instead, construing 28 U.S.C. § 1915(d), the court merely held that "a [pro se]

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*/In this connection the Court of Appeals, citing Lucas v. Hodges, 730 F.2d 1493 (D.C. Cir. 1984), abstractly stated that customary administrative practices can give rise to a protected liberty interest "at least when they are sufficiently formalized." Although the Parole Board attempts to elevate this statement into a major holding, the statement merely supported the court's conclusion that Brandon's complaint arguably stated a due process claim based on administrative practice. It should be noted that the court subsequently vacated the opinion and judgment in Lucas for mootness. See 738 F.2d 1392 (D.C. Cir. 1984).

complaint need not indisputably state a cause of action to survive sua sponte dismissal; instead, if the complaint has at least an arguable basis in law and fact -- if the complaint is viable -- it cannot be deemed frivolous." (Pet. App. at 5a; 734 F.2d at 59 (emphasis in original).) This unremarkable holding is consistent with this Court's decision in Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam),*/ and follows the decisions of other Courts of Appeals on the meaning of "frivolousness" under 28 U.S.C. § 1915(d). See, e.g., Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983); Holloway v. Gunnell, 685 F.2d 150, 154 (5th Cir. 1982); Boyce v. Alizaduh, 595 F.2d 948 (4th Cir. 1979); Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981). The holding below scarcely requires review in this Court.

2. Even if the Court of Appeals had reached the issues relied on by the Board of Parole, and even if those issues merited review by this Court,**/ it would be premature to address them now. The complaint in this case was dismissed sua sponte, and the Board of Parole has not yet even answered or otherwise pleaded. Thus, there has been no discovery conducted and no evidentiary record created. Yet development of the facts in the district court obviously could significantly affect the legal issues presented, and the lower courts ultimately could dispose of the case in ways obviating any need to address the issues proffered by the Parole Board. In

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*/In Hughes, this Court ruled that a pro se complaint may not be dismissed pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 449 U.S. at 10. Accord, Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam). See also Estelle v. Gamble, 429 U.S. 97 (1976).

**/The D.C. Board of Parole recently proposed extensive amendments to its regulations governing the grant of parole. See 31 D.C. Register 5777 (Nov. 16, 1984).

these circumstances, there is no justification for granting the petition and addressing issues that this Court ultimately may never need to decide, or, at a minimum, that the Court can better decide after a complete record has been developed. See generally Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., dissenting in part) ("[t]he court will not anticipate a question of constitutional law in advance of the necessity of deciding it").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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